2009

State of Utah v. Anthony David Milligan : Brief of Appellant

Utah Court of Appeals

Ronald Fujino; Counsel for Appellant.
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. ANTHONY DAVID MILLIGAN, Defendant/Appellant.	Case No. 20090999-CA Priority No. 2

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Murder, a 1st degree felony, in violation of Utah Code Ann. § 76-5-203, and Attempted Murder, a 2nd degree felony, in violation of Utah Code Ann. §§ 76-4-101; 76-5-203, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Randall Skanchy, Judge, presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. §§ 77-18a-1(1)(a); 78A-4-103(2)(j); and Utah R. App. P. 3(a).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Whether, during a trial on the charges of Murder and Attempted Murder, the lower court erred in not granting a mistrial after it already had ruled inadmissible any reference to Mr. Milligan's crown tattoo because thereafter, in disregard of the prior court order, the prosecution witness addressed the inadmissible evidence by suggesting that Mr. Milligan's crown tattoo reflected his involvement in numerous murders. The issue was preserved during the trial proceedings. R 268 at 12, 105.

"[O]nce a district court has exercised its discretion and denied a motion for a mistrial, we will not reverse the court's decision unless it "is plainly wrong in that the

incident so likely influenced the jury that the defendant cannot be said to have had a fair trial." *State v. Allen*, 108 P3d 730, 2005 UT 11, ¶ 39 (citations omitted).

2. Whether prior counsel performed unreasonably and prejudicially in not objecting to the court's amended sentence, imposed in the defendant's absence and without any advocacy by defense counsel. Mr. Milligan's attorney on appeal is different from Mr. Milligan's attorney at the trial court level. Appellate counsel now raises the unpreserved issue pursuant to a claim of ineffective assistance of counsel or the applicable principles below.

"When an ineffective assistance of counsel claim 'is raised for the first time on appeal without a prior evidentiary hearing, it presents a question of law.'" *State v. Isiah Bo'Cage Vos*, 2007 UT App 215, ¶ 9 (Utah App 2007) (citations omitted); U.S. Const. Amend. VI. Ineffective assistance of counsel may be established by showing that counsel "(1) rendered deficient performance which fell below an objective standard of reasonable professional judgment, and (2) counsel's deficient performance prejudiced him." *State v. Hernandez*, 2005 UT App 546 ¶ 17, 128 P.3d 556 (Utah App. 2005) (citation omitted). "An abuse of discretion results when the judge fails to consider all legally relevant factors or if the sentence imposed is clearly excessive." *State v. Maestas*, 63 P.3d 621, 2002 UT 123, ¶ 11 (citations omitted).

For unpreserved issues, the matter also may be reviewed under the doctrines of plain error or manifest injustice. *State v. Morgan*, 813 P.2d 1207, 1210-11 (Utah App.

1991); *State v. Casey*, 2003 UT 55 at ¶ 40, 82 P.3d 1106 ("'[M]anifest injustice' has been defined as being 'synonymous with the "plain error" standard.'"); *see also Casey*, 2003 UT 55 at ¶ 41 (The manifest injustice or the plain error standard requires the appellant to show that "'(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.'"); *Myers v. State*, 2004 UT 31, ¶ 20, 94 P.3d 211 ("To establish ineffective assistance of counsel, 'a defendant must show (1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.'").

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

The texts of the following relevant constitutional and statutory provisions are contained in this brief or Addendum A.

Utah Const. art I, § 12
Utah R. Crim. P. 22(a)
Utah R. Evid. 404(a)
Utah Code Ann. § 77-18a-1
Utah Code Ann. § 76-3-401
Utah Code Ann. § 76-5-203
Utah Code Ann. § 77-18-1(7)
Utah Code Ann. § 78A-4-103
Utah R. App. P. 3(a)

STATEMENT OF THE CASE

On or about October 5, 2007, the State filed an Information against Anthony Milligan, and a co-defendant, Marco Heimuli, which alleged the crimes of Criminal Homicide, Murder, a first degree felony, and Aggravated Assault, a second degree felony. Record ("R") at 1-3. In addition, the Information alleged that the offenses were subject to enhanced penalties. R 1.

On February 21, 2008, contemporaneous with the preliminary hearing proceeding, the State filed an Amended Information that alleged the same crimes of Criminal Homicide, Murder, a first degree felony, and Aggravated Assault, a second degree felony, R 31-32, together with an additional alternative count of Attempted Murder, a second degree felony. R 32. The Amended Information also included enhanced penalties provisions.

On September 25, 2009, a jury found Mr. Milligan guilty of Criminal Homicide, Murder, a first degree felony, and Attempted Murder, a second degree felony, R 237, together with the enhancement provisions. R 351-52.

On November 16, 2009, the trial court sentenced Mr. Milligan for Murder, a first degree felony, to an indeterminate term of not less than six years and which may be life in the Utah State Prison. R 275 at 19; 243A. For the Attempted Murder conviction, a second degree felony, the court sentenced him to a term of 2 to 15 years in the Utah State Prison. R 275 at 19; 243A.

On November 25, 2009, the State filed a "Motion to Correct an Illegal Sentence." R 248. In response to the State's ex parte motion, the court changed Mr. Milligan's sentence in both a minute entry, R 244-45, and in an December 15, 2009, signed order that listed "the sentence for count 1 Murder is 15 years to life, with an additional 1 year for the minimum time for the weapon enhancement. Count 2 remains the same." R 257. The order did not address whether the sentences were imposed consecutively, R 257, although the minute entry stated that "[t]hese counts are to run consecutive to each other and any other commitments previously serving." R 245.

STATEMENT OF THE FACTS

For the purpose of this appeal, the facts noted by Adult Probation and Parole in its presentence report appropriately summarized the evidence (disclosed in open court and of public record) as determined by the jury at trial:

> On July 4, 2006, at approximately 2:00 a.m., victim Tevita Vaenuku'[s] girlfriend called him and told him she was at a party and her two friends had been assaulted. She went on to say two of the men who participated were "strapped" and said they would shoot her if she said anything. Victim Vaenuku and victim Kyle Durr drove to the location of the party and when they arrived, they saw several males walking toward them and three of the males were carrying guns. The victims turned and ran away, and the men began shooting at them. Mr. Durr was struck in the left forearm and required emergency attention at a local hospital for his injury. Mr. Vaenuku was shot, and fell to the ground, dying a short time later before emergency medical personnel arrived. Through an extensive investigation with multiple witnesses, it was determined the defendant had shot victim Kyle Durr, and Marco Heimuli had shot victim Tevita Vaenuku.

SUMMARY OF THE ARGUMENT

The trial court erred in not granting Mr. Milligan's motion for a mistrial. The court earlier had ruled that evidence regarding Anthony Milligan's crown tattoo would be an improper and prejudicial consideration for the jury. According to a prosecution witness, the tattoo signified that Anthony had already killed six people, a highly inflammatory reference for a person on trial for Murder and Attempted Murder. During trial, the witness testified about the very matter that had been deemed inadmissible and the jury never was told that the witness' claims were in fact false. Mr. Milligan did not receive a fair trial.

For the sentencing proceedings, the court erred and prior defense counsel was ineffective in allowing a second sentence to be imposed without Mr. Milligan being present. In the first sentence, the court imposed, *inter alia,* a prison term of 5 years to life for the Murder conviction. Mr. Milligan and his counsel were present for the initial sentence. Thereafter, however, the State moved to correct the first sentence. In response to the ex parte motion, the lower court imposed a second sentence against Mr. Milligan in his absence and without the benefit of counsel. The amended sentence changed the prison term from 5 years to life to a minimum mandatory prison term of 15 years to life. The court violated his constitutional "right to appear and defend in person," Utah Const. art I, § 12, his right to allocution, and his right to counsel. His prior attorney ultimately failed to take any steps to correct the second sentence and simply filed the notice of

appeal. Counsel's inactions and lack of advocacy at sentencing amounted to prejudicial and deficient performance.

ARGUMENT

POINT I. THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL WHEN A STATE WITNESS SUGGESTED THAT MR. MILLIGAN WAS INVOLVED IN SIX PRIOR MURDERS

In *State v. Allen*, 108 P3d 730, 2005 UT 11, the opinion reviewed a number of circumstances where an improper statement was presented to the jury and the appellate court had to determine if the error had deprived the defendant of a fair trial.

For example, in *State v. Butterfield*, 2001 UT 59, 27 P.3d 1133, the high court held that the "district court did not abuse its discretion in refusing to grant a mistrial after a witness testified that he had obtained the defendant's photograph from the Salt Lake County jail." *Butterfield*, 2001 UT 59, ¶ 47, *cited in Allen*, 2005 UT 11, ¶ 40. "Similarly, in *Wach*, we held that a district court did not abuse its discretion where it declined to grant a mistrial after a witness violated the parties' previous stipulation by introducing evidence of the defendant's prior bad acts." *Allen*, 2005 UT 11, ¶ 41 (citing *State v. Wach*, 2001 UT 35, 24 P.3d 948. "We reasoned that the statement was 'not elicited by the prosecutor,' was an 'isolated, off-hand remark, buried in roughly 244 pages of testimony,' and was 'not necessarily inflammatory.'" *Wach*, 2001 UT 35, ¶ 46. In *State v. Decorso*, 1999 UT 57, 993 P.2d 837, "we concluded that a ... [witness' improper] reference to other crimes was 'vague' and 'came only after a lengthy direct examination

and lengthy cross-examination,' and that the proceedings 'move[d] along without undue interruption and directed the jury's attention to other matters." *Decorso*, 1999 UT 57, ¶ 39; *see generally Allen*, 2005 UT 11, ¶ 42 (citing cases).

By contrast, however, the prosecution's improper statement in Mr. Milligan's trial should be viewed differently because virtually no reference carries the same prejudice as the suggestion that a defendant had previously killed six people. Prosecution witness, Joel Shuler, claimed that Mr. Milligan "had told me [Shuler] that he [Milligan] didn't think anybody should have a crown on their head unless they killed six people." R 268 at 79; R 268 at 105 ("unfortunately, my client [Mr. Milligan] has a crown tattooed on his head and has had throughout the proceedings.... And the Court did [earlier] rule pretty clear[ly] that he [Joel Shuler] should not talk about the crown being a symbol of committing murders").

The crown tattoo on Mr. Milligan's bald head was prominent and unmistakable. *Compare* http://www.ksl.com/?nid=148&sid=1406732 (tattoos on Curtis Algiers' head and face). Not only was his crown tattoo something that the jury could not ignore during the entirety of his five day trial, since the emotional impact of the crown tattoo would have provoked an unmistakable knee-jerk adverse emotional reaction for any ordinary juror, *cf. id.,* the error was exacerbated because the crown tattoo implicated him in a prior murder – in fact, six prior murders. *State v. Maurer*, 770 P.2d 981, 984 (Utah 1989)

("'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.").

Admittedly, the crown tattoo was a quick remark, R 268 at 111, but the gravity and severity of its message (i.e. he killed six people, a false accusation that remained un-rebutted for the jury who had no reason to believe it was not true) permeated Mr. Milligan's trial in a manner far greater than the less significant evidence at issue in other trials. *See, e.g., Butterfield*, 2001 UT 59, ¶ 47 (defendant's jail photograph improperly admitted).

The lower court recognized such prejudice at the outset when during the course of trial it excluded any such reference. R 268 at 12 (order granting defense motion in limine regarding the crown tattoo as such references constituted surprise to the defense as there was no discovery or evidence concerning six prior murders and the prejudicial effect substantially outweighed its probative value).

Following the tattoo reference, defense counsel was left in a quandary, as potential remedies such as a jury instruction or an explanation would have drawn further prejudicial attention to the tattoo's meaning. R 268 at 105 ("The real problem we have, is my client is in prison for a murder.... I guess I could [tell] the jury ... [that] he's innocent or not guilty of this particular murder but he's in prison on another murder and that's why he has a crown."); *id.* at 106 (if "I bring in the fact of his other murder conviction, which as the Court [knows], ... would be almost as bad" to explain his tattoo).

To compound matters, a prosecution witness improperly introduced character evidence, claiming that Milligan was "a crazy dude[.]" R 268 at 73. The State also attempted to admit evidence relating to the tattoo, despite the court's earlier contrary ruling, on the basis that his gang membership provided him with incentive to commit the murder. *Id.* at 77. The trial court disagreed, however, and acknowledged the prejudicial impact of gang evidence. R 268 at 108 ("I [the court] know we don't like evidence coming in associated with gangs because it has propensity for a normal person to feel that way [being in a gang makes him a bad guy]"); *accord United States v. Harris*, 587 F.3d 861, 867 (7th Cir. 2009) (citation and internal quotation marks omitted) ("Evidence of gang membership can be inflammatory, with the danger being that it leads the jury to attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury's negative feelings toward gangs will influence its verdict. . . . For that reason, we have asked district courts to consider carefully whether to admit evidence of gang membership and gang activity in criminal prosecutions").

While the court apparently agreed with defense counsel that such matters amounted to improper propensity evidence, the numerous testimonial references to such inadmissible matters further weigh in favor of Mr. Milligan's request for a mistrial. R 268 at 108 ("I think we have been running this trial ... right on the edge of making it into sort of ... an anti-gang trial. In other words, I think the jury could easily just convict my client because they think he's a bad guy. Propensity sort of grounds and not really

look[ing] at the evidence."); Utah R. Evid. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, ..."). The lower court erred in not granting Mr. Milligan's motion for a mistrial. He did not receive a fair trial.

POINT II. THE COURT ABUSED ITS DISCRETION (AND PRIOR COUNSEL PERFORMED INEFFECTIVELY IN NOT OBJECTING) WHEN THE COURT AMENDED MR. MILLIGAN'S SENTENCE IN HIS ABSENCE AND WITHOUT ALLOWING DEFENSE COUNSEL TO ADVOCATE AGAINST CONSECUTIVE SENTENCES

Ineffective assistance of counsel may be established by showing that counsel "(1) rendered deficient performance which fell below an objective standard of reasonable professional judgment, and (2) counsel's deficient performance prejudiced him." *State v. Hernandez*, 2005 UT App 546 ¶ 17, 128 P.3d 556 (Utah App. 2005) (citation omitted); U.S. Const. Amend. VI. In addition to counsel's ineffectiveness in not objecting to the court's amended sentence – imposed without the defendant being present and without any advocacy by his attorney, the parallel principle was that the trial court exceeded its discretion by not "consider[ing] all legally relevant factors ..." *State v. Maestas*, 63 P.3d 621, 2002 UT 123, ¶ 11 (citations omitted).

At the very least, Mr. Milligan was entitled to the right of allocution at the time of sentencing. His right to personally address the court at sentencing was a legally relevant factor that the court could not dismiss or ignore on its own. Defense counsel was similarly obligated to bring such an issue to the court's attention, together with the weight

placed on counsel's shoulders to advocate on his client's behalf against the imposition of consecutive sentences. The defendant's right of allocution is an entitlement central to Utah's constitutional history.

"Even prior to the writing and adoption of our state constitution, Utah territorial law required the physical presence of a convicted felon at sentencing." *State v. Maestas*, 63 P.3d 621, 2002 UT 123, ¶ 47. The founding fathers of Utah's constitution maintained the physical presence requirement by specifically inserting the guarantee into our governing document. A criminal defendant expressly retains "the right to appear and defend in person." Utah Const. art I, § 12. "Thus, from the beginning of the development of this state's criminal procedures, a high value was placed on a defendant's availability and opportunity to speak at trial and sentencing." *Maestas*, 2002 UT 123, ¶ 47. "Allocution is an 'inseparable part' of the right to appear and defend in person guaranteed by the Utah Constitution." *Id.*

Utah's procedural rules similarly implemented the constitutional right of allocution: "Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed." Utah R. Crim. P. 22(a). Consistent with the above constitutional guarantee, when Rule 22 afforded the defendant an opportunity to "show any legal cause why sentence should not be imposed," it re-emphasized the requirements of the defendant's appearance and his right of allocution.

Maestas, 2002 UT 123, ¶ 47; Utah Code Ann. § 77-18-1(7) ("At the time of sentence, the court shall receive any testimony, evidence, or information the defendant ... desires to present concerning the appropriate sentence")

In the case at bar, the trial court improperly sentenced Mr. Milligan in violation of the above guarantee to "appear and defend in person." Utah Const. art I, § 12. The amended nature of the sentence did not excuse the violation, nor would an illegal aspect in the sentence (even if one existed).

Rule 22 allowed a court to "correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." Utah R. Crim. P. 22(e). Notwithstanding such an allowance, however, the Rule does not allow such a correction to a sentence – illegal or otherwise, to be performed in the defendant's absence.

Following the jury trial, the lower court first sentenced Mr. Milligan on November 16, 2009, for Murder, a first degree felony, to an indeterminate term of not less than six years and which may be life in the Utah State Prison. R 275 at 19; 243A. For the Attempted Murder conviction, a second degree felony, the court sentenced him to an indeterminate term of 2 to 15 years in the Utah State Prison. R 275 at 19; 243A. The two counts were imposed consecutively to each other and then consecutively to any other existing sentences. R 275 at 19.

On November 25, 2009, the State filed a "Motion to Correct an Illegal Sentence." R 248. In sum, due to a legislative amendment to the punishment for Murder, the prison

term changed from 5 years to life to a minimum mandatory term of 15 years to life. Utah Code Ann. § 76-5-203. Accordingly, "the State urge[d] the Court to correct the current sentence on count 1 Murder from 5 years to life to 15 years to life with the additional year for the weapons enhancement." R 249. In response to the State's ex parte motion, the court changed Mr. Milligan's sentence in both a minute entry, R 244-45, and in an December 15, 2009, signed order: "the sentence for count 1 Murder is 15 years to life, with an additional 1 year for the minimum time for the weapon enhancement. Count 2 remains the same." R 257.

However, the December 15, 2009, order did not address whether the sentences had been imposed consecutively. R 257. Hence, just on the face of the court's December 15, 2009, Order, there was an issue as to whether Count 1, Murder, and Count 2, Attempted Murder, were to be imposed concurrently or consecutively. The plain language of the December 15, 2009, Order, did not address the issue and no record proceedings were held to explain the matter. *But see* Utah Code Ann. § 76-3-401 (emphasis added) ("A court shall determine, if a defendant has been adjudged guilty of more than one felony offense, whether to impose concurrent or consecutive sentences for the offenses. The court shall state on the record and shall indicate in the order of judgment and commitment: (a) if the sentences imposed are to run concurrently or consecutively to each other; and (b) if the sentences before the court are to run concurrently or consecutively with any other sentences the defendant is already serving.").

Although the minute entry, dated both November 16, 2009 (date noted at the top of the first page via typed entry), and December 16, 2009 (dated noted at the bottom of the second page via handwritten entry), stated that "[t]hese counts are to run consecutive to each other and any other commitments previously serving[,]" R 245, the sentencing violation still exists. Mr. Milligan was not present during the amended sentencing proceeding. Since there was no record of the amended sentencing proceeding, Mr. Milligan was denied his right of allocution, as well as the right to have his counsel advocate against the imposition of consecutive sentences. *See also* Utah R. Crim. P. 22(c)(1) (due to the defendant's absence when the court finalized its minute entry, the court failed to adhere to the Rule's requirement to "advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed" from the December 15, 2009, date of the amended sentencing (as opposed to the November 16, 2009, original sentencing proceeding).

For instance, in addition to Mr. Milligan's absence at sentencing and his right to allocution, his counsel may have addressed the Utah Code Ann. § 76-3-401(3) "later offense" requirement or argue inappropriateness: "The court shall order that sentences for state offenses run consecutively if the later offense is committed while the defendant is imprisoned or on parole, unless the court finds and states on the record that consecutive sentencing would be inappropriate." Id. (emphasis added). According to the presentence reports, the case at bar involving Tevita Vaenuku was not the "later offense" – a plain

language argument of the statute and a sentence not necessarily ripe for a consecutive presumption based on the time-line for another sentence in an unrelated case.

The relevant offenses include case 071907398 (Mr. Vaenuku's murder) which was committed factually on July 6, 2006. The court imposed the amended sentence in -7398 on December 15, 2009. With case 061906304, however, one of the sentences upon which the -7398 sentence was imposed consecutively, the -6304 case constituted the "later offense" because it was committed factually on September 16, 2006. Thus, the statutory presumption for consecutive sentences would not apply to the July 4, 2006, case because the "later offense" of case -6304 was committed on September 16, 2006. The statutory language focus on whether the "later offense is committed while the defendant is imprisoned or on parole" similarly renders inapposite the consecutive presumption as a matter of law (as opposed to the trial court's discretionary power).[1]

The exception to the requirement of a defendant's presence at sentencing is inapplicable to Mr. Milligan's case. "On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence." Utah R. Crim. P. 22(b). Nothing in the record supports the trial court's decision to

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[1] See also State v. Anderson, 203 P.3d 990, 2009 UT 13 ¶ ("It is inappropriate for a judge to make a concurrent or consecutive sentencing determination based on future crimes that were not committed at the time the sentence was imposed."); id. at ¶ 16 ("[i]f the legislature intended section 76-3-401(1)(b) to apply only if a defendant was already imprisoned, it could have easily stated as much"); id. at ¶ 17 ("'actually served' means incarcerated").

impose sentence in Mr. Milligan's absence, as no such grounds existed for going forward with either the trial in absentia or the sentence in absentia. *Compare State v. Wanosik*, 79 P.3d 937, 2003 UT 46. Therefore, no lawful basis existed for the court's imposition of the amended sentence in Mr. Milligan's absence and/or his counsel's absence.

Alternatively, prior counsel was ineffective for not objecting to the trial court's decision to sentence Mr. Milligan in his absence. Prior counsel knew or should have known about the amended sentencing minute entry as counsel presumably received a copy of the State's motion to correct an illegal sentence and counsel also presumably and timely filed the notice of appeal in this case based on the date of sentencing. Mr. Milligan asks that this case be remanded back to the trial court for sentencing.

POSITION ON ORAL ARGUMENT

Oral argument is not requested.

CONCLUSION

The deficient and prejudicial actions or inactions by prior counsel necessitate a new trial. Defendant/Appellant, Anthony Milligan, respectfully requests that this Court reverse his conviction and remand his case for a new trial.

SUBMITTED this 13 day of December, 2010.

Ronald S. Fujino
Attorney for Mr. Milligan

CERTIFICATE OF DELIVERY

I hereby certify that I have caused the original and seven copies of the foregoing to be delivered to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and two copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 13 day of December, 2010.

Addendum A

(Rules, Statutes, and Constitutional Provisions)

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Utah Const. art I, § 12 [Rights of accused persons.]

> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.
>
> Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Utah R. Crim. P. 22(a) Sentence, judgment and commitment.

> (a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.
>
> Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.
>
> (b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c)(1) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

• • •

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

Utah R. Evid. 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(a)(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(a)(2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(a)(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

Utah Code Ann. § 77-18a-1 Appeals -- When proper.

(1) A defendant may, as a matter of right, appeal from:

(a) a final judgment of conviction, whether by verdict or plea;

(b) an order made after judgment that affects the substantial rights of the defendant;

© an order adjudicating the defendant's competency to proceed further in a pending prosecution; or

(d) an order denying bail, as provided in Subsection 77-20-1(7).

Utah Code Ann. § 76-3-401. Concurrent or consecutive sentences -- Limitations -- Definition.

(1) A court shall determine, if a defendant has been adjudged guilty of more than one felony offense, whether to impose concurrent or consecutive sentences for the offenses. The court shall state on the record and shall indicate in the order of judgment and commitment:

(a) if the sentences imposed are to run concurrently or consecutively to each other; and

(b) if the sentences before the court are to run concurrently or consecutively with any other sentences the defendant is already serving.

(2) In determining whether state offenses are to run concurrently or consecutively, the court shall consider the gravity and circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant.

(3) The court shall order that sentences for state offenses run consecutively if the later offense is committed while the defendant is imprisoned or on parole, unless the court finds and states on the record that consecutive sentencing would be inappropriate.

(4) If a written order of commitment does not clearly state whether the sentences are to run consecutively or concurrently, the Board of Pardons and Parole shall request clarification from the court. Upon receipt of the request, the court shall enter a clarified order of commitment stating whether the sentences are to run consecutively or concurrently.

(5) A court may impose consecutive sentences for offenses arising out of a single criminal episode as defined in Section 76-1-401.

(6) (a) If a court imposes consecutive sentences, the aggregate maximum of all sentences imposed may not exceed 30 years imprisonment, except as provided under Subsection (6)(b).

(b) The limitation under Subsection (6)(a) does not apply if:

(I) an offense for which the defendant is sentenced authorizes the death penalty or a maximum sentence of life imprisonment; or

(ii) the defendant is convicted of an additional offense based on conduct which occurs after his initial sentence or sentences are imposed.

(7) The limitation in Subsection (6)(a) applies if a defendant:

(a) is sentenced at the same time for more than one offense;

(b) is sentenced at different times for one or more offenses, all of which were committed prior to imposition of the defendant's initial sentence; or

(c) has already been sentenced by a court of this state other than the present sentencing court or by a court of another state or federal jurisdiction, and the conduct giving rise to the present offense did not occur after his initial sentencing by any other court.

(8) When the limitation of Subsection (6)(a) applies, determining the effect of consecutive sentences and the manner in which they shall be served, the Board of Pardons and Parole shall treat the defendant as though he has been committed for a single term that consists of the aggregate of the validly imposed prison terms as follows:

(a) if the aggregate maximum term exceeds the 30-year limitation, the maximum sentence is considered to be 30 years; and

(b) when indeterminate sentences run consecutively, the minimum term, if any, constitutes the aggregate of the validly imposed minimum terms.

(9) When a sentence is imposed or sentences are imposed to run concurrently with the other or with a sentence presently being served, the term that provides the longer remaining imprisonment constitutes the time to be served.

(10) This section may not be construed to restrict the number or length of individual consecutive sentences that may be imposed or to affect the validity of any sentence so imposed, but only to limit the length of sentences actually served under the commitments.

(11) This section may not be construed to limit the authority of a court to impose consecutive sentences in misdemeanor cases.

(12) As used in this section, "imprisoned" means sentenced and committed to a secure correctional facility as defined in Section 64-13-1, the sentence has not been terminated or voided, and the person is not on parole, regardless of where the person is located.

Utah Code Ann. § 76-5-203 Murder

(2) Criminal homicide constitutes murder if:

(a) the actor intentionally or knowingly causes the death of another;

(b) intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another;
© acting under circumstances evidencing a depraved indifference to human life, the actor knowingly engages in conduct which creates a grave risk of death to another and thereby causes the death of another;

(3) (a) Murder is a first degree felony

(b) A person who is convicted of murder shall be sentenced to imprisonment for an indeterminate term of not less than 15 years and which may be for life.

(4) (a) It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another under a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

(b) The reasonable belief of the actor under Subsection (4)(a) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

Amended by Chapter 125, 2009 General Session
Amended by Chapter 206, 2009 General Session

Utah Code Ann. § 77-18-1(7)

(7) At the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony, evidence, or information shall be presented in open court on record and in the presence of the defendant.

Utah Code Ann. § 78A-4-103

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of ...

(j) cases transferred to the Court of Appeals from the Supreme Court.

Utah R. App. P. 3(a). Appeal as of right: how taken.

(a) Filing appeal from final orders and judgments. An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.